SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

July 9, 2009

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Re: ***Freibott v. Miller et al.***
C.A. No. 08C-11-025-RFS (Sussex County)
Caravatti v. Indian Harbor, Inc. et al.
C.A. No. 09C-02-059-MMJ (New Castle County)

Upon Motion to Consolidate. Granted.

Dear Counsel:

I have reviewed Mr. Naylor's motion to consolidate two pending Superior Court cases in New Castle and Sussex Counties. Mr. Shachtman opposes the motion. Oral

argument was held on Thursday, July 2, 2009. The motion was not opposed by counsel for the other parties.

These cases arise out of a leak and water damage that occurred on or about February 9, 2007 at Indian Harbor Villas Condominiums in Bethany Beach, Delaware. A sprinkler used by David and Lynn Miller ("the Millers") in Unit #3 burst and leaked into Unit #2 owned by Frederick and Elaine Freibott ("the Freibotts"). The water also spread into Unit #4, located on the other side of Unit #3. Unit #4 is owned by Marie-Louise Caravatti ("Cavaratti").

The Freibotts filed suit in Sussex County on November 20, 2008. They claim the Millers and Indian Harbor, Inc., Indian Harbor Villas, Inc. and Indian Harbor Villas Condominium Association, Inc.(collectively "the IHV defendants") were negligent in various ways. The IHV defendants are charged with breaching certain responsibilities under the Condominium Declaration. Also, the Freibotts sued Randall A. Snowling, President of Indian Harbor Villas Condominium Association, Inc. for causing damages through an alleged unjustified delay in reporting the incident to an insurance carrier. They also sued Kristin Konstruction Company ("Kristin") for allegedly defective remedial work.

On February 6, 2009, Caravatti filed a nearly identical law suit in New Castle County. Like the Freibotts, Caravatti sued the IHV defendants and Kristin. However, the

Millers and Snowling were not sued. Also, Caravatti charged another contractor, Diamond Restoration, Inc. ("DRI") for damages in Unit #4 arising from allegedly negligent demolition work and for exceeding cleanup authority. DRI did satisfactory remedial work for the Freibotts so it was not named in the Sussex litigation.

Both complaints charge the IHV defendants with identical responsibilities under the Condominium Declaration. Both plaintiffs charge Kristin with legal responsibility for damages. The allegations as to the origin, spread and consequences from the water leak are common.

Superior Court Civil Rule 42(a) governs consolidation motions. It states:

> [w]hen actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issues in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to award unnecessary costs or delay.

Under this rule, a judge has broad discretion to consolidate cases for trial "so that the business of the court may be dispatched with expedition and economy while providing justice to the parties."[1] The initial inquiry focuses on whether common issues of law, or fact, or both exist. "In addressing the issue of commonality, the question is whether there is a sufficient nexus between the cases to warrant consolidation."[2]

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[1] *Olson v. Motiva Easter, L.L.C.*, 2003 WL 21733137, at *4 (Del. Super. 2003) (quoting 9 *Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure*: Civil 2D § 2381 (2d. ed. 1995)).

[2] *Ison v. E.I. Dupont De Nemours and Co.*, 2004 WL 2827934 at *2 (Del. Super. 2004).

Actions need not be identical before they may be consolidated.[3] Consolidation may be ordered where different damage claims are filed if the commonality requirement is satisfied.[4] Also, where enough common and related issues exist such that "it would needlessly waste both time and manpower to require separate trials," the parties need not be the same.[5] However:

> Even where considerations of convenience or savings predominate, a motion to consolidate should not be granted if it would result in undue prejudice or would be fundamentally unfair to one or more of the parties involved, or confuse the jury.[6]

Generally, consolidation is appropriate when "any confusion or prejudice does not outweigh efficiency concerns."[7]

After review, these cases will be consolidated for the following reasons:

a) Common legal and factual issues predominate in these cases. Similar factual allegations are made against the IHV defendants and Kristin. The date of the incident and the apparent cause of the claims made against the IHV defendants and Kristin are the same. Identical legal theories are asserted against the IHV defendants. The differences in the legal theories asserted against Kristin and DRI on contractual and

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[3] *In re Cendant Corp. Litigation,* 182 F.R.D. 476, 478 (D.N.J. 1998).

[4] *Id.*

[5] *Waldman v. Electrospace Corp.*, 68 F.R.D. 281, 284 (S.D.N.Y. 1975).

[6] *Ison, supra* at *2.

[7] *Primavera Familienstiftung v. Askin*, 78 F.R.D. 405, 411 (S.D.N.Y. 1998).

negligence grounds are not confusing or prejudicial. Without consolidation, there is a risk of inconsistent verdicts and unfair *res judicata*/collateral estoppel consequences to the named parties;

b) DRI's answer claimed that Caravatti failed to join an indispensable party as required in Superior Court Civil Rule 19, namely, the Millers which Mr. Shachtman acknowledged at oral argument. DRI's point that the Millers are indispensable supports the common features of law and fact discussed above. In a consolidated action, they would at least be in the same courtroom, albeit not technically joined.[8]

c) DRI's other objections to consolidation are:

(i) DRI would have to review discovery material and would have to attend depositions that were not relevant to its defense of the Caravatti claim. However, DRI does not need to attend or respond to discovery that has no bearing in its alleged liability to Caravatti. Snowling's alleged personal responsibilities to the Freibotts for delaying the insurance claim do not involve DRI. Freibott's claim against Kristin is for allegedly defective work done at Unit #2, not Unit #4. DRI's argument that it would be forced to participate in irrelevant discovery is unfounded. DRI can protect itself

[8] Consolidation does not alter the separate identity of the underlying suits. "The parties of one action do not become parties to the other." *Chaara v. Intel Corp.*, 410 F.Supp2d. 1080, 1084 (D.N.M. 2005). To that extent, the Rule 19 objection would remain, but it seems counterintuitive that DRI should be able to complain about participating in a trial where the Millers are present.

against surprises through appropriate discovery measures directed to Caravatti and to Kristin in defense of its crossclaim.

(ii) DRI argues that it has an awkward position because the damages claimed by the Freibotts and Caravatti are different. Freibott's recovery may exceed $400,000; Caravatti's relief may be in the $70,000 range. Differences in the measurement of damages do not thwart consolidation.[9] Concerning the type of damages, discovery can separate flood problems from those arising from defective or unauthorized work.

(iv) DRI argues its litigation costs will rise with a trial and motion practice in Sussex County. Concerning motions, counsel may participate by telephone if desired. As a practical matter, summary judgment and even non-dispositive motions are often decided on a written record. The expense to appear at trial in Georgetown is minimal compared to the damages sought and to the global savings achieved by consolidation.

d) Both the New Castle and Sussex County cases are in similar stages of litigation. A Scheduling Order has not yet been entered. Consolidation would not cause further delay and possible prejudice.[10]

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[9] *Grospitz v. Abbot*, 2005 WL 3078594 at *2 (W.D.Mo. 2005).

[10] *Bruno v. Borough of Seaside Park*, 2006 WL 2355489 at *2 (D.N.J. 2006) (Slip. copy) [consolidation denied partly because suits were at "much different stages of litigation"].

e) Consolidation will conserve judicial resources and will avoid the necessity of duplicative pleadings. The jury will be instructed as to the respective positions, and its decision making will be guided by them.[11] The controversy arising from a broken sprinkler is unlike a complex toxic tort; a jury is not likely to suffer confusion by relatively simple multiple claims or be inflamed by evidence admissible against one but not all of the parties. Any risk of prejudice or confusion would be slight. It is outweighed by the danger of inconsistent adjudications of factual and legal issues with separate trials and the need for the efficient management of the Court's docket. Overall, the time and expenses for resolving these cases will be less with consolidation than if tried separately.[12]

Considering the foregoing, the motion to consolidate is granted, and the Court's Order of June 30, 2009 is confirmed. Counsel will confer and contact the Court to prepare a Scheduling Order.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

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[11] Limiting instructions are appropriate in consolidated litigation and insure a fair trial. *See Gospitz supra*.

[12] Kristin agreed to consolidation for purposes of discovery. Counsel for the other parties did not oppose consolidation. The cases are consolidated for trial for the reasons expressed above.

RFS/cv

cc: Prothonotary